

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DONNA K. SOUTTER, for herself and :
on behalf of all similarly : Civil Action No.
situated individuals : 3:10CV107
vs. :
EQUIFAX INFORMATION SERVICES, LLC L June 13, 2011

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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United States District Court

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1 P R O C E E D I N G S

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3 THE COURT: Hello.

4 MR. BENNETT: Hello, Judge.

5 THE COURT: This is Soutter against Equifax,
6 3:10CV107. Who is here for whom?

7 MR. BENNETT: Your Honor, for the plaintiff, this is
8 Leonard Bennett speaking. Also on the call are Mr. Pittman and
9 Mr. Erausquin.

10 MR. GOHEEN: Your Honor, Barry Goheen and Tony Love
11 are on the call representing the Equifax defendant.

12 THE COURT: Mr. Montgomery had a meeting at
13 three o'clock and we had to move it, so he's not on the phone.

14 MR. GOHEEN: Right, Your Honor.

15 THE COURT: There's a motion by Equifax to stay
16 deadlines pending interlocutory review. The Fourth Circuit
17 granted the review. Is there a schedule, briefing or anything
18 yet?

19 MR. GOHEEN: Barry Goheen, Your Honor. Not yet. We
20 would expect one to be forthcoming pretty soon, but, no. All
21 that occurred was on June 1st, the Fourth Circuit just entered
22 a very short order granting the petition, and it did not
23 include a briefing schedule with that order.

24 MR. BENNETT: Judge, this is Leonard Bennett. It
25 also included an order retaining the record at the district

1 court which is one of the triggering times under the Federal
2 Rules of Appellate Procedure. We expect -- the estimate,
3 Judge, depending upon, of course, what the Fourth Circuit
4 briefing schedule is, would put the defendant's brief due 40
5 days or so out, our brief a month after that, and, of course,
6 whenever -- if the other party requests oral argument, then
7 whatever date that the Fourth Circuit provides for that.

8 THE COURT: Well, they wouldn't hear it until
9 September at the earliest.

10 MR. BENNETT: Yes, Your Honor.

11 THE COURT: Maybe not until October. I don't know
12 what they've got on their schedule. Generally, I thought that
13 you called the case manager and agreed on a briefing schedule.
14 Don't you do that anymore?

15 MR. BENNETT: Judge, given my -- I've had four Fourth
16 Circuit appeals. We -- the briefing schedule -- none of them
17 were 23(f). The briefing schedules just came in the ordinary
18 course of the case, fairly early after receipt of the notice of
19 appeal by the Fourth Circuit, and the date doesn't run until
20 the record hits, and in this instance, the district court
21 record has been ordered to remain at the district court level.

22 We believe, and this is not based on long expertise,
23 but based on the rules and discussion with a lawyer that does
24 practice in that courthouse still, that the 40-day period would
25 already be running from the record order that the Fourth

1 Circuit issued.

2 THE COURT: I would suggest that you all go ahead and
3 call over there and talk to the case manager and see what the
4 schedule is, but that's up to you all. You apparently oppose
5 the motion for a stay.

6 MR. BENNETT: No, sir. No, sir.

7 THE COURT: Huh?

8 MR. BENNETT: Judge, we do not oppose --

9 THE COURT: You say, plaintiff is not in agreement
10 concerning a stay, is what the motion says.

11 MR. BENNETT: Yes, sir. That's not entirely correct.

12 THE COURT: So what is correct?

13 MR. BENNETT: Judge, we agree and would have asked
14 ourselves for a stay with respect to the notice and the class
15 list development process.

16 THE COURT: Yes, I would think so.

17 MR. BENNETT: And so there was no disagreement as to
18 there. There also is no disagreement as to discovery of
19 matters that would not otherwise be necessary or part of the
20 discovery of an individual case. Where we disagree is that --
21 and it's not apparent whether or not it's still being
22 advocated, because it wasn't a proposed order with details of
23 the stay, but we would disagree with a stay of everything as in
24 the Court locks down the docket and we come back in November.

25 There is no reason for that from our perspective.

1 There's no benefit to either side, because the discovery with
2 respect to Donna Soutter's claim or any of the other individual
3 claims, if it ever went to that or if it went to a different
4 class definition, would all be the same with respect to certain
5 matters, what are Equifax's procedures, how did they come to
6 adopt those procedures --

7 THE COURT: Excuse me. Are you saying you want to
8 proceed with discovery on Ms. Soutter's individual case? Is
9 that what you are saying?

10 MR. BENNETT: Yes, sir, or at least on class issues
11 that are individual issues as well. To the extent that there's
12 full overlap --

13 THE COURT: What is there, a class issue that's an
14 individual issue? I don't understand how that can even be.

15 MR. BENNETT: Willfulness, Judge. How it is that
16 Equifax came to adopt the procedures that are challenged in
17 this case is evidence that would be used for Ms. Soutter's
18 individual case as well as for the class --

19 THE COURT: I know that, but once you've had that --
20 that's still -- the answer to the question is you really want
21 discovery as to Ms. Soutter's class.

22 MR. BENNETT: Yes, sir, that's correct.

23 THE COURT: All right. Now that we understand that,
24 where do you stand on that, Mr. Goheen?

25 MR. GOHEEN: We believe that that should be stayed as

1 well.

2 THE COURT: Why?

3 MR. GOHEEN: Our view is one of the primary arguments
4 on the class cert in the papers as well as in the argument
5 before the Court in February was that the cases are not
6 individually viable, that there's not a -- class adjudication
7 is the only way to adjudicate the particular allegations being
8 made here.

9 You know, if that's the case, if that argument, which
10 I believe probably must have been accepted at some level on the
11 class cert order is true, there is not individual -- should be
12 no individual case if the Fourth Circuit were to reverse class
13 certification. I guess I'd assume that --

14 THE COURT: Wait a minute, Mr. Goheen. They didn't
15 argue, the plaintiff didn't argue that there wasn't a viable
16 claim. They were arguing that because -- if I recall the
17 argument correctly, that because of the nature of the claim,
18 there wasn't enough incentive in it to proceed with individual
19 cases, that individuals would, therefore, forego the pursuit of
20 the case, and, therefore, for that reason, that was one of the
21 reasons why class certification or class treatment was
22 appropriate. That's what I recall the argument being --

23 MR. GOHEEN: I think that accurately characterizes
24 it, I think more accurately than I did, but I was trying to say
25 essentially what Your Honor said, is that there was no

1 incentive for individual consumers to pursue the claims. I
2 think Ms. Soutter is an individual consumer. That's my point.

3 THE COURT: Doesn't that really depend on Mr.
4 Bennett?

5 MR. BENNETT: The better way of phrasing it, Your
6 Honor, is we argued that class certification was superior to
7 relying on 200,000 individual consumers to find their own
8 lawyers and pursue their own claim. The fact that Donna
9 Soutter, out of 200,000 people, has a lawyer that is hardheaded
10 enough to pursue an individual case is not dispositive of
11 whether or not class versus individual treatment is superior.

12 THE COURT: Well, I think I understand that point.
13 Anything else on what, if anything, to stay that you all want
14 to argue about?

15 MR. GOHEEN: This is Barry Goheen again. I think
16 what we generally would get into if a stay of discovery is not
17 granted is that we will have trifurcated discovery to the
18 extent there are these class issues still remaining that need
19 to be the subject of discovery after the Fourth Circuit renders
20 whatever decision it's going to render on the appeal.

21 I guess I simply don't see the efficiency to be
22 gained by going through the schedule which, right now, is an
23 end of discovery November and summary judgment motion practice
24 in December. I think it's unlikely we'll have a decision by
25 then. We could, but I think it's probably not going to happen

1 by then, so we're supposed to file motions -- take discovery on
2 a very discrete set of issues and file motions for summary
3 judgment under the current schedule only to come back and do it
4 again, conceivably, unless the Fourth Circuit has an outright
5 affirmance which, obviously, is possible.

6 On the current appeal, it just seems like now we've
7 gotten into much more of a -- you know, it's already
8 bifurcated. We get into a trifurcated situation, and we may
9 have to redo or repeat steps in the discovery process. I
10 respectfully suggest that's not contemplated by the rule here
11 or by the schedule that the parties agreed upon prior to the
12 petition being granted.

13 THE COURT: Anything else?

14 MR. BENNETT: No, Your Honor.

15 THE COURT: I think it's appropriate to stay the
16 proceedings as respects the class. The Fourth Circuit now is
17 going to have to decide those issues, and we shouldn't be
18 proceeding with the action as a class action here while the
19 Fourth Circuit is doing that. That's not contemplated by the
20 rule or the statute or by any aspect of judicial efficiency or
21 respect for judicial hierarchy which I happen to be a great
22 believer in. So I believe that aspect of the stay should be
23 granted.

24 I don't see any reason, if Mr. Bennett is prepared to
25 proceed with Ms. Soutter's case, he can't go on and get the

1 case ready, and if it's ready to be tried by the time that the
2 Fourth Circuit decides the case as a class, then we'll just
3 deal with what the impact of that is down the road.

4 It may be that Mr. Bennett will choose just to go on
5 and try the Soutter case, and if he wins on class certification
6 maybe there'll be somebody else who will want to pursue the
7 class. Maybe they won't, but it seems to me if he's willing to
8 go forward, Ms. Soutter's case need not be delayed, and she can
9 be proceeding with her case.

10 And I would like -- I think that aspect of the case
11 should not be stayed. I happen to believe that the decision on
12 the class certification was correct or I never would have
13 issued it. That doesn't mean that other people could not feel
14 differently about it, and I recognize that, and the Fourth
15 Circuit wants to hear the issue and is concerned enough about
16 it to hear it. That's a sufficient indication to me that the
17 likelihood-of-success factor could be met, and I believe that
18 the rest of the factors warranting an appropriate stay counsel
19 in favor of granting the stay, but as to Ms. Soutter's case, I
20 believe you ought to proceed and go forward with discovery. Do
21 we have a trial date?

22 MR. BENNETT: I believe we set a May date, Judge.

23 THE COURT: That was for class trial; is that right?

24 MR. BENNETT: Yes, sir, Judge. We would still like
25 to have the trial date to come after the Fourth Circuit has had

1 an opportunity to rule.

2 THE COURT: What is the schedule for discovery, et
3 cetera, et cetera? I don't have that at hand.

4 MR. BENNETT: November discovery cutoff.

5 THE COURT: On the merits of the case?

6 MR. BENNETT: Yes, sir.

7 THE COURT: And then --

8 MR. BENNETT: Judge, my preference, what we would ask
9 for or move for would be to set a status conference in the
10 beginning of October. By then we would know -- at least we
11 would have briefing completed, maybe argument scheduled, and
12 the parties could be heard and the Court could decide the
13 appropriate path from that point, again, to make sure that our
14 bearings are still in order for the efficiency of the
15 litigation.

16 THE COURT: Mr. Goheen, is that schedule suitable
17 with you?

18 MR. GOHEEN: It is, Your Honor, for the reasons I
19 guess I have said, because I would be very leery about -- if
20 the Fourth Circuit has not ruled on the appeal or issued an
21 opinion on the appeal by the end of the November 18th discovery
22 deadline and the end-of-the-year deadline to complete briefing
23 on summary judgment, whether we should, especially with regard
24 to summary judgment, go through with that briefing absent an
25 opinion from the Fourth Circuit on the current appeal.

1 THE COURT: Well, I mean it may be that Mr. Bennett
2 wants just to proceed with Ms. Soutter's case as an individual
3 case and let somebody else carry the cudgel in the class case
4 if he wins the class issue. I don't know what he's got in
5 mind, and I'm not going to get into that. That's not my
6 business, but I think we stay with the current schedule on
7 discovery, the discovery cutoff, and your summary judgments
8 schedule, and then we'll have a conference call in October to
9 check the status of the matter after you've gotten part way
10 through the process. I'll set a conference call on
11 October 28th at 2:00 p.m.

12 MR. GOHEEN: What was that date Your Honor?

13 THE COURT: October 28th, Friday, at 2:00 p.m. Is
14 that all right with everybody?

15 MR. BENNETT: Yes, sir.

16 MR. GOHEEN: Yes, Your Honor.

17 THE COURT: I would like for you to give me a report
18 on the 24th of October about the status of where you are in the
19 Court of Appeals as well as where you are in your discovery in
20 this case.

21 MR. BENNETT: Yes, sir.

22 THE COURT: All right. I'll issue an order. Thank
23 you very much.

24 MR. BENNETT: Thank you.

25 THE COURT: Goodbye.

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/s/
P. E. Peterson, RPR

Date _____